EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR R HALPIN	**V**	**EVERBRIGHT SUN HUNG KAI (UK)**

HELD AT: LONDON CENTRAL **ON: 20-21 & 24-27 JANUARY 2022**

EMPLOYMENT JUDGE EMERY

REPRESENTATION:
For the claimant: In person
For the respondent: Mr K McNerney (Counsel)

JUDGMENT

The Tribunal's Judgment is:

1. The reason for the claimant's dismissal was redundancy

2. The claimant's selection for redundancy was fair, the claim for unfair dismissal therefore fails and is dismissed

3. The claimant was subjected to unlawful public interest disclosure detriments by:
    a. being disciplined for gross misconduct
    b. in part, the way the disciplinary process was conducted

c. being found to have committed acts amounting to gross misconduct
d. being referred to the FSA for having committed acts amounting to gross misconduct

Accordingly the claimant's claim he was subjected to public interest disclosures succeeds in part.

4. All other claims of public interest disclosure detriments fail and are dismissed.

REASONS

The Issues

1. The claimant was employed as Head of Research and Head of China Product by the respondent, a UK-based subsidiary of a China-based financial services company. The claimant was dismissed, the respondent argues on ground of redundancy. The claimant argues that in his first redundancy consultation meeting he made public interest disclosures relating to a decision of the respondent's management to withdraw an adverse investment recommendation against a group company, a China-based bank. He argues that he was subject to 24 detriments as a consequence, including bullying conduct, a failure to offer an alternative role, being subject to a disciplinary process for gross misconduct and being reported to the FSA for having committed an act of gross misconduct.

2. The respondent contends the claimant's dismissal was fair; in particular post-purchase by the respondent, based in China, it no longer needed the claimant's role in London as it was duplicated in China, and there was no alternative role to offer.

3. The respondent accepts that the claimant had a genuine and reasonable belief that, as it was a FCA regulated entity, that the respondent had potentially committed regulatory breaches. It says however that the claimant made these disclosures when he did with bad faith. It does not accept that it subjected the claimant to any detriment. The respondent contends that it disciplined the claimant based on its reasonable belief in his misconduct, and fairly reported him to the FSA, that this was in no-way related to his alleged whistleblowing.

4. The Issues as agreed between the parties in the bundle were very lengthy; below they have been summarised.

Unfair dismissal

5. What was the reason for dismissal? R asserts redundancy.

6. Was the dismissal of C fair in accordance with Section 98 of the Employment Rights Act 1996, such that it was within the range of reasonable responses open to a reasonable employer? Specifically:

   a. Was there a genuine redundancy situation?;

b. Was it reasonable to place C in a pool of one?;

c. Was the decision to dismiss C taken because C's role was to be deleted from R's structure?;

d. Was C's appeal completed in accordance with R's own policy?;

e. Has R failed to offer C suitable alternative employment?; and

f. Was R's overall process fair in accordance with equity and the substantial merits of the dispute?

Whistleblowing Detriments' claim contrary to Section 47B

7. Protected Disclosure 1 & 2

a. On 20 September 2019 C disclosed to Mr Egan orally, that:

i. He believed that R had breached its regulatory requirements in that it had sent and then recalled a mass email and attachment to clients, containing a negative 'Reduce Holdings' rating to China Everbright Bank [Co., Ltd], a sister company of R
ii. The Analyst had not written research on this company again
iii. R's senior management had interfered in the research process to prevent negative coverage of this sister company, and that this was contrary to R's regulatory obligations.

b. On 24 September 2019 the C provided a recording of the first redundancy consultation meeting on 20 September 2019, containing the allegation set out above.

c. The relevant legal obligations alleged to have been breached by the respondent are legal and regulatory requirements for an FCA regulated business:

i. not to permit a conflict of interest in the conduct of its business;

ii. for senior management to restrict FCA Regulated advisors from publishing accurate, but unfavourable reports because of their own commercial interests; and/or

iii. to ensure that its advisors acted in the best interests of its customers, and provided advice which was accurate, and not modified to be in R's, or R's sister companies' own best interests. C's disclosure tended to show that R was likely to distort the advice given about Everbright Bank, which could lead to customers suffering losses, and/or to receiving advice which was not in their best interests?

d. R accepts (made on its behalf by Mr McNerney on day 3 of the hearing) that C had a genuine and a reasonable belief that Disclosures 1&2 were in the public interest. However, R does not accept that C made the disclosures in good faith, Mr McNerney characterised it as made for an "ulterior purpose"

8. Detriment

Has R subjected C to a detriment as a result of Disclosures 1, and/or 2, specifically:

a. Detriment 1 - on 24 September 2019 during a redundancy consultation meeting with Mr Egan, C was criticised for requesting time changes to the redundancy consultation meetings which were held on 20 and 24 September

b. Detriment 2 – since 20 September 2019 R began combing through all of the C's actions on the R's systems, calls and/or e-mails to identify any basis to accuse him of gross misconduct, and to commence disciplinary proceedings against him

c. Detriment 3 - on 26 September 2019 during a redundancy consultation meeting with Mr Egan C was criticised for responding to messages from a colleague and communicating with an ex-colleague

d. Detriment 4 – R did not follow its own policy in respect of the Claimant's 20 September 2019 Disclosures, and generally failed to keep him informed or to progress the investigation expediently, as set out in the R's Compliance Manual, or respond to his 13 November 2019 requests

e. Detriment 5 – on 4 October 2019 C's role was made redundant. R refused to offer C alternatives to redundancy which he had proposed (move to another office, voluntary pay cut, be 'bumped down' to a more junior role);

f. Detriment 6 – on 16 October 2019 C was required to attend a disciplinary investigatory meeting without notice, or right of accompaniment which was contrary to R's policy;

g. Detriment 7 – on 16 October 2019 Mr Egan conducted a disciplinary investigatory meeting with C in a bullying and intimidating manner. Specifically,

    i. demanding that C come into the office immediately on a working from home day, to face unevidenced allegations, and
    ii. mocked the way C spoke, and particularly his use of the word "sorry" when explaining he was trying to be more accurate;

h. Detriment 8 – on 16 October 2019 Mr Egan conducted a disciplinary investigatory meeting with C at which he did not give C sight of any of the evidence against him;

i. Detriment 9 – on 21 October 2019 C was required by Mr Egan to answer a disciplinary case regarding his use of files on R's systems, without the details of these allegations being provided

j. Detriment 10 – on 22 October 2019 C was criticised for his use of files on R's systems, and was requested to immediately attend the office to discuss; in a phone call C was required to address disciplinary allegations which he had not been given details of and without a colleague present

k. Detriment 11 – on 22 October 2019 C was invited to attend a disciplinary hearing by Mr Egan. R's treatment of C was inconsistent given two named staff had acted in similar ways to the claimant

l. Detriment 12 – on 28 October 2019 – disciplinary hearing conducted by Mr Egan, who had an involvement in the issue, and when it was practicable for another to conduct this hearing

m. Detriment 13 – on 28 October 2019 Mr Egan conducted the disciplinary hearing with C in a biased manner, specifically, trying to lead C into making statements that would substantiate the allegations Mr Egan was making that were otherwise not backed by any evidence

n. Detriment 14 – on 28 October 2019 Mr Egan conducted the disciplinary hearing with C without giving him sight of another employee's (called X in this judgment) written statement of events, although it was relied on by R to make findings against C

o. Detriment 15 – on 28 October 2019 Mr Egan made accusations of gross misconduct against C relating to actions that Mr Egan had been aware of for more than three years and had previously taken no action over. Specifically, C was criticised for storing files created at previous employment on R's IT systems, despite Mr Egan previously permitting such action;

p. Detriment 16 – on 15 November 2019 Mr Egan found C guilty of gross misconduct and did so by making adverse findings against C to discredit him and/or because he was annoyed by C's protected disclosures. One finding contradicted Mr Egan's own statement, that he knew that C had told a colleague (X) he had removed files from the NextCloud account, and Mr Egan refused to seek further evidence from X, and he disregarded C's offer to return files, and he disregarded C's explanation for removing the files, and he maintained a stance that C viewed the all the files as his own. Additionally, Mr Egan failed to consider the reasons C had given for not attending a meeting in person; and he failed to evidence C's actions in contacting clients disobeyed any instruction

q. Detriment 17 – R chose to base the outcome of the disciplinary process on a company disciplinary policy that had been created by R's lawyer one day before R issued a letter alleging gross misconduct

r. Detriment 18 – on 22 November 2019 C was told that the full grounds of his appeal against a finding of gross misconduct might not be considered as he had not filed them within five working days. This deadline was obviously unreasonable, and was not part of R's disciplinary policy

s. Detriment 19 – on 26 November 2019 refusing his appeal against redundancy

t. Detriment 20 – R significantly delayed addressing C's 29 October 2019 grievance until 19 December 2019

u. Detriment 21 - on 19 December 2019 R's Chairman, Mr William Yeung, rejected C's grievance, and upheld a finding of gross misconduct

v. Detriment 22 - R continued to deny C sight of X's statement.

w. Detriment 23 – on 20 December 2019 R's COO, Mr Patrick Egan, notified the Financial Conduct Authority of the misconduct findings made against C

x. Detriment 24 – on 20 December 2019 R's CEO, Mr Richard Abrahams, notified the Financial Conduct Authority of the misconduct findings made against C

Remedy

9. What amount of Compensatory Award is C entitled to?

10. Should there be any reduction to reflect the percentage chance C would have been dismissed in any event?

11. What amount of damages is C entitled to in respect of financial losses caused by a finding of gross misconduct, and/or by a refusal to reconsider the redundancy decision?

12. What level of injury to feelings award is C entitled to?

13. What amount of interest, and for what period of time is C entitled to in respect of the loss of earnings, or injury to feelings' claims?

14. Is C entitled to an uplift for breaches of the ACAS Code, and if so what percentage?

Time

15. Are C's claims of whistleblowing detriment in time?

16. If not, do the claims of whistleblowing detriment amount to a continuing series of events in which the final act is in time?

17. If not, has C brought his claims within such further period as the tribunal considers reasonable where it was not reasonably practicable for the complaint to be presented before the end of that period of three months?

    a. Were the claims presented within a period of three months starting with the date to which the complaint relates?

    b. Did the alleged conduct extend over a period so that it should be treated as being done at the end of that period?

    c. If no to (a) and (b) (above) the claim is out of time. Is it then just and equitable for the tribunal to extend time?

Witnesses and Tribunal procedure

18. We heard first from the respondent's witnesses, who have the burden of proving the reason for dismissal, and then from the claimant. The respondent's witnesses are:

    a. Mr Patrick Egan, the respondent's then Chief Operating Officer, now CEO, who made C redundant and who investigated and disciplined the claimant
    b. Mr Bob Benton, a NED of the respondent who heard C's appeal against dismissal
    c. Mr William Yeung, based in respondent's parent company's Hong Kong office, who heard C's grievance.

19. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during dismissal and the investigation and disciplinary processes.

20. I read documents referred to in statements and in evidence. This judgment does not recite all of the evidence I heard, instead it confines its findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions

Disclosure and Tribunal process

21. At the outset of the hearing the respondent made an application to adduce as evidence disclosure of transcripts of recordings of hearings involving the claimant, including transcripts of redundancy consultation meetings, at which it is alleged by the claimant he made public interest disclosures; the transcripts also contain what the respondent characterised as *"critical evidence"* in the case. Some of the transcripts have been reproduced in the respondent's witness evidence.

22. I accepted that these transcripts may well contain important evidence. But, a previous Order of the Tribunal dated 24 September 2021 refused an application by the respondent to rely on the transcripts. It is not in this Tribunal's power to overturn a previous order made, and the application to put in the transcripts of these meetings was refused.

23. The implications were as follows. Both parties had copies of the transcripts, the respondent had reproduced some of the transcripts in their witness evidence. As an example a part of the claimant's case is that Mr Egan acted inappropriately at a meeting; the transcript has relevant evidence relating to this, that it would be "unjust" argued Mr McNerney not to be able to submit this evidence. The claimant's evidence contained assertions of what was said in the relevant meetings, which was denied by the respondent.

24. During the course of the hearing, the following process was adopted: if either party does not accept the veracity of oral and written evidence relating to these meetings, they had leave to challenge it by way of specific reference to the relevant parts of the transcript, these parts could be disclosed their accuracy having been agreed by the parties, and to be used only for this purpose. In the event, no evidence about what was said at the meetings was challenged in this manner.

The relevant facts

25. The claimant was employed as Head of Research and Head of China Product by the respondent. His record of performance in role was positive, receiving promotions (to Head of China Product) in March 2018), and pay-rises. The respondent is regulated by the FCA.

26. At the outset of his employment on 25 May 2016 the claimant sought IT help, he wanted to install Dropbox onto his computer. He was told he could not, instead he was asked to OneDrive to store *"work files",* and he asked about the storage limit (154-8). Mr Egan was copied into some of this email chain. It is the claimant's case that, at this date, the respondent would have been aware from these emails that he needed this storage space to utilise spreadsheets and other documents he was bringing to the role.

27. In July 2016 the claimant again sought help from IT support, ccing Mr Egan. The emails says *"I am having persistent problems running some of my spreadsheets on my current desktop. It takes a long time for the computer to run calculations, the computer often freezes.. .and links between spreadsheets and other programmes.. do not work"* Mr Egan responded, the claimant *"…Is crunching big numbers, that's what he was hired to do. can we do something to address the issue?"*

28. In the emails that followed, the claimant said (again Mr Egan was copied,), *"It worked at my last place"*, also pointing out *"this spreadsheet has not been built very efficiently… … but the slowness is a wider problem I'm having with most of my spreadsheets…";* Mr Egan intervened to ensure that the claimant had an

adequate desktop computer to run these programmes. The new computer assisted *"the spreadsheets are still slow, but they are now workable"* (160-168).

29. In January 2017 there were still spreadsheet issues, IT was saying that it was *"complicated"* to resolve, and Mr Egan responding, *"Apparently [the claimant] has 15 of these spreadsheets… I am neutral on it provided we can get a solution. As discussed we will pay for your extra time whatever course we decide to take once we get a sense of time and materials…"* (173).

30. The claimant's position is these email chains in May and July 2016 and January 2017 show Mr Egan was aware that he was bringing his own spreadsheets to the role and continuing to develop them. The data the claimant required was then inputted into the spreadsheets from the 'Wind-Economic Database' (a data-aggregation product used by the respondent); the data and the spreadsheets would enable him *"crunch"* the numbers. As the claimant put it, the spreadsheets were a *"tool"* to enable him to undertake his analysis.

31. On 29 March 2019 an email was sent by an Analyst employed by the respondent in Hong Kong to clients, attaching an Equity Research report on a sister company of the respondent, China Everbright Bank. The report's conclusion was the Bank had *"unbalanced growth"* and recommended *"reducing holdings"* in it (241-7). Within 5 hours the sender attempted to 'recall' this email and attachment (248). This issue became the subject of the claimant's public interest disclosure on 20 September 2019.

32. In 2019 the respondent's financial position was loss-making: it was essentially being kept afloat by its parent company and was under pressure to cut costs. Mr Egan's evidence was that it was losing £75,000 per month, that there was *"pressure to make the business cash flow positive … to run in the black."*

33. The claimant argued that the respondent was in profit by the time of his redundancy (452). Mr Egan characterised this return to profitability is being because of a £1.1m subsidy from the parent company; this was in part because the respondent needed to be financially viable for regulatory reasons, *"… so they started supporting us in 2019 … we provide services [to the parent] and gain genuine sales revenue - for a service and at a fair value…".* I accepted that the respondent was essentially being kept in profit by services it provided to its parent company for payment, also that the parent had an interest in maintaining a profitable FSA regulated entity in its company portfolio.

34. Prior to the claimant's purported selection for redundancy, there was no cost savings plan produced; instead says Mr Egan there was discussion amongst the respondent's managers, and it was agreed that the claimant's research output was not providing return on his costs (salary etc). The respondent concluded that there were researchers based in China who were producing research and were *"highly rated in China"*. It was discussed and decided within the respondent that it could leverage the China research being produced in China; *"…And this is the claimant's role, no one else was performing this role - so [the claimant's redundancy] seemed to be reasonable place to go … It's an improvement and a costs saving."*

35. The claimant argues that a colleague 'X', had been put at risk of redundancy in 2018, and should have been considered again. Mr Egan argued that this employee had a different skill set which was not readily duplicated in China, including sales experience; he was also earning far less than the claimant.

36. The claimant was informed by emailed letter and short meeting on 17 September 2019 that he was under threat of redundancy and was asked to attend a meeting on 18 September 2019; this was changed at the claimant's request to 20 September 2019. The letter states *"During the consultation period … I suggest that as regards the message to external people, we agree to say something simple such as you are out of the office on leave."* (252).

37. On 19 September, the claimant deleted several hundred files from the respondent's online system. He retained these files on his work laptop. It is the claimant's case that the vast majority of these files were the spreadsheets he created for use for his role, *"… as I had done throughout my career"*, that many of these were the files that he had added to the system at the beginning of his employment. He says that he was required to install these on the respondent's systems instead of using Dropbox, *"and when I was told I was being made redundant, I deleted them"* from the respondent's system.

38. The claimant argues that his view at the time was he did not need to inform his employer before doing so, as the files *"do not belong"* to the respondent, that this was *"like a personal file on the IT system … I took the view that I will cut off access, to remove my 'personal files' from IT system"*. He says that once not linked to the Wind-Economic database, the files will not use the respondent's data, "*they would only become useful if joined a new firm".*

39. The parties agree that the claimant also deleted files which he had not created. The claimant argues that there was a minimal number of files which did not belong to him which he deleted in error, that he apologised for this.

40. Transcript notes in the bundle record that at the 20 September meeting the claimant was told not to tell clients of his potential redundancy (253-4). The claimant was placed on garden leave.

41. It is accepted that at the 20 September 2019 meeting the claimant told Mr Egan be believed there was an issue with the 29 March 2019 Analyst report on China Everbright Bank, that the respondent had breached its regulatory requirements by recalling this email. He also said that he had received regulatory training recently which had made this clear to him, and he had been meaning to discuss his concerns with Mr Egan.

42. The claimant's case is that Mr Egan took this allegation as a threat; in fact Mr Egan says so in his statement (paragraph 17) – he saw this as *"an implicit threat"*. In his evidence Mr Egan said that this was because of the *"suspicious correlation"* in the timeline, the claimant raising this having just been informed of redundancy. Given this evidence, I concluded that Mr Egan reached at the outset a view that

the claimant was raising this issue as a malicious act because he had been informed of his likely redundancy.

43. The timing of the claimant's allegation became a significant issue in evidence, the respondent saying that he would have raised it earlier if he was raising it in good faith. The training was completed on 21 August 2019, and the claimant was on leave from 23 August to 2 September. He argues that he was *"permanently flat out"* before and after his leave, and he did not prioritise informing his manager of his concern. His argument was that the disclosure happened in March, his training was in August and that *"…maybe I should have done, but I didn't immediately prioritise. … it was not right not to [make the disclosure] - but pressure of work and context, I delayed."* He argued that a training module on Conflict *"rang alarm bells … and I thought this raises issues with the March report, but I did not look into it"* straight away.

44. There followed over the next 2 weeks a further 7 calls between the claimant and Mr Egan, heavily edited excerpts from the transcripts are at pages 253-7 and they show the claimant challenging the rationale for redundancies, the apparent lack of plan, the requirement for costs savings. While only limited transcripts are in evidence, I accepted that the respondent's genuinely held position at the end of the process can be summarised by Mr Egan's comment during the 7th redundancy consultation call on 3 October 2019, *"We don't need a Head of Research, can't afford a Head of Research"* (256).

45. In the 2nd redundancy call on 24 September Mr Egan says that some clients appear to be aware he may be leaving. The claimant stated that he has been trying to find another job and had *"reached out"* to personal contacts to do so. It was reiterated by Mr Egan and agreed by the claimant during this call that during the process the message to clients would be that he was out of the office or on leave (255).

46. Before the final redundancy meeting the claimant offered to reduce his salary by 40%; the response was that even at a reduced salary it was a cost the company was unwilling to incur; the respondent reiterated the position that the work could be undertaken from China, that this had been an issue already discussed with him (271-2).

47. On 4 October 2019 the claimant was informed in writing that his role was being made redundant. He was to continue on garden leave *"on the same basis as we have previously discussed'*. There was no explicit reference to him not being able to inform clients or staff of his redundancy. The claimant was given the right of appeal within 5 working days, *"setting out your grounds of appeal"* (275-6).

48. The claimant appealed on 9 October, with detailed grounds of appeal, asserting that *"the company has not demonstrated that there was a genuine need for redundancy",* arguing that there had been an *"unreasonable and insensitive"* consultation process. It raised detailed issues of substantive and process failures in the 5½ page document (320-5).

49. A call occurred between the claimant and Mr Egan on 16 October 2019 – it's content was to discuss a handover, for which the claimant was required to attend work the next day. He agreed to do so having initially said he would need to check his availability. He was also informed that there was an issue with his continuing contact with clients.

50. In this call, the claimant says that Mr Egan mimicked him. The transcript in the bundle records the following: the claimant: *"…No. Sorry, sorry Patrick, Sorry, this is not what I said…"* to which Mr Egan responded *"Sorry Raf, sorry Raf, sorry Raf…;* the claimant's response was *"If you're not going to take this seriously and act maturely, I'm going to walk out of here."* (257).

51. In his evidence Mr Egan stated that it was *"a fraught meeting. … I was not as dispassionate as I would have liked, this was frustrating, I regret this, but we were in trench warfare. [The claimant was] pedantic, aggressive, making accusations of bullying, this was personal and upsetting."*

52. In an email the same day, Mr Egan stated that the claimant had continued to contact clients despite being told not to do so, that he had been *"completely dismissive"* when asked about this. He referred to the first consultation meeting on 20 September and the email later that day, the 2nd consultation meeting in which he was told not to discuss his situation with clients. He referred to his 4 October letter, that the claimant would continue on garden leave *"on the basis as we have previously discussed".* The email says that the claimant's *"…recent emails have caused the company a great deal of concern and potential damage …. This has occurred as a direct consequence of your email to this client that you sent in contravention of a direct instruction to you. This is clearly a disciplinary matter …. I want to make it clear that the company reserves the right to take disciplinary action …".*

53. The email states that there was now an issue of trust, and he was asked to return his company laptop, and informed that he no longer had access to the company systems (280-81).

54. Later that day, a handover email from Mr Egan to the claimant asked him for *"spreadsheets or workings the following data items…"* listing 39 items (284-5).

55. The claimant attended work on 17 October 2019 and met with employee X and other staff and a handover commenced. Some of the documents could not be accessed and there was a discussion between the claimant and X.

56. What was said at the handover meeting became a matter of some dispute, and a written statement was provided by X during the later disciplinary process. The claimant's case is that he said to X at the handover that (i) he had deleted files from the respondent's system because he was concerned the files did not contain the respondent's IP; (ii) but he was willing to discuss their return with Mr Egan. Mr Egan's note of a subsequent conversation he had with X, which X confirmed in writing was an accurate summary of their call, says that the claimant had told X (i), but not (ii).

57. In his evidence, the claimant argued that the focus was at the handover was not on his spreadsheets; *"there's no value in saying here's the spreadsheet and here's the way I pieced it together – it's my messy idiosyncratic work. What they wanted is an understanding of how to get the broad data".* In the course of this handover the 'steel folder' was opened, there was no data in it *"and I explained I had deleted… he saw the steel folder, and clicked in - and I gave the explanation. In fact they did not want to see spreadsheets … this was a spreadsheet that worked for me in a way they did not understand. So they did not want spreadsheet - but X went into the steel file and he clicked in and I gave explanation."*

58. On 21 October 2019 Mr Egan emailed asking for help on *"the files missing … that we need for the handover do you have other copies? It is odd … the empty folders were last updated 19 September …".* Two emails followed from Mr Egan and an attempt to speak, as *"We have found some further information out above the files, can you call me as a matter of urgency..".* In a further email *"… it seems that a very large number of files were moved …. and then deleted…"* on 19 and 23 September*. "The evidence suggests that you did this."* The claimant was told absent a reasonable explanation disciplinary proceedings *"will be commenced"* (291-3).

59. For the claimant, this email is evidence that Mr Egan was *"laying out a case … with limited information he jumped and warned of a disciplinary…"*

60. The next morning the claimant responded *"As I mentioned to [X] these are files based on research I did before joining the company... Just to confirm they don't contain any sensitive company information/proprietary work happy to have a conversation around sharing these files if you like…"* (291).

61. There was a call between Mr Egan and the claimant on 22 October 2019 at 9.24am. Mr Egan asked the claimant to attend the office that day. The transcript of this call is not in the bundle, but the parties agree that the claimant said he would not attend. The reasons he gave in his statement was that he had felt intimidated by Mr Egan's comment ("yes Raf, yes Raf, yes Raf..") on 16 October, also he had no knowledge of what was to be discussed.

62. As the claimant was saying he would not come to the office, Mr Egan agreed to undertake the meeting by phone and the issues of concern were discussed with the claimant later that day.

63. In the disciplinary investigation call which took place later that day (22 October 2019) the claimant was told that he was being investigated for deleting material from the company server, that *"it looks like company theft …. It looks like you've deleted all these records from our servers. Maliciously. … Right after … that redundancy conversation… which is a very serious issue".* The claimant responded *"hands up, I'm very very very sorry, that it seems that inadvertently I deleted company files. Of course, I'm happy to give anything back that falls into that category…".* He said that he had mentioned to colleague X *"all these points"* a few days earlier. The notes record the claimant saying said *"I'd be willing to share them"* (257-8). There followed a series of emails that day, in which the

claimant confirmed that he had uploaded to the respondent's server the Next Cloud files he had removed.

64. The same day, 22 October, Mr Egan wrote to the claimant saying that here would be a disciplinary hearing on 28 October 2019 to consider 3 allegations: the first: *"given what I consider to be a potentially unsatisfactory answer … that you had taken some of this material from previous employers and essentially you thought it was 'yours'"*. The letter states that 423 files were removed on 19 September, other files deleted on 23 September. A statement from the IT specialist was enclosed containing details of the files removed. The claimant was told the meeting would go through this sheet to determine which were company related, which were previous employment related, and which were personal files.

65. Allegation 2 was that the claimant had refused to attend the office when asked to do so that day. Mr Egan's evidence was this became a disciplinary issue because he felt the claimant was *"…using scheduling of meetings to delay and frustrate. The first 1 - 2 times I did agree to change , then I decided I was getting steamrolled, and I became more firm…"*. The claimant's evidence was that two of the rescheduled meetings were for him to attend job interviews. He also pointed to his contract stating he was entitled to a day working from home, and Mr Egan had requested a meeting on 16 October, a wfh day. Mr Egan's evidence was that he did not know the claimant's contract contained this clause. He said that he considered that *"every exchange was fraught by this time, he was difficult and pedantic on every single issue"*.

66. The claimant's evidence was that in making this allegation, Mr Egan disregarded the reasons given by the claimant for not wanting to attend in person; *"he makes no reference to the fact that I had complained about being bullied and wanted to do meeting over phone"*. The claimant accepted the premise put to him that *"any employer who had been told that 500 files had been deleted would ask their employee to come in to explain…"*.

67. Allegation 3 referred back to the 16 October meeting and email *"in respect of you contacting clients following instructions not to do so, which you disputed".* The claimant's case was that he had made contact with contacts of his to look for work after his redundancy had been confirmed, that he did not believe that the restriction on contact applied after the redundancy process had been concluded and his redundancy confirmed. Mr Egan's evidence was that it was perfectly obvious that this restriction still continued, that this had been made clear to the claimant.

68. The claimant was told the allegations could amount to gross misconduct; he was told of his entitlement to have a TU rep or work colleague present (296-7).

69. On 25 October 2019 Mr Egan emailed the claimant saying that *"it looks like a total of 976 files were deleted …."*. The claimant was asked to go through each the files he had removed and confirm if each is *"…something you produced and worked on during your employment, … or if it is something that you took from a previous employer, … or if it is something which is completely personal and not work-related?"*

70. I noted that the questions out to the claimant were closed questions, and do not ask another question – the one the claimant was putting forward as his explanation – that the majority of documents were ones he had created and used in other employers as a tool to enable him to do his role; in other words an argument that they were not 'taken' from any employer.

71. I also noted that Mr Egan did not consider at any stage whether the material did in fact contain any proprietary or confidential information.

72. The disciplinary hearing on 28 October 2019 was conducted by Mr Egan. The notes show the claimant asserting *"I offered to return these files as part of the handover process. I had a conversation with [X], when I said some files have been removed because I'm concerned it's not the company's IP. I said I'd be willing to return those files and take you through the files"* (256-7). He said that *"… it seems like I made a bit of a mistake – I believed because those files had been created by me at previous companies, … I believed that they were not [the respondent's] IP …I told X… that I'd removed some files, that I was willing to share them… dependent on discussing my concerns around the IP".* (258-9).

73. That evening the claimant emailed saying he had been advised that the hearing *"should have been conducted by someone impartial, with no prior involvement … you cannot be considered impartial".* In response, Mr Egan said this was *"preferable … but not always possible".* He said there was one senior manager and a non-exec Director *"and that is essentially it"* (326-7).

74. Mr Egan's evidence was that he was the only available manager, *"I can't recall what the issue was … I would prefer not to have done it but I decided that I am the only Director in the UK … but I did not want to chair this at all."*

75. The claimant's case is that Mr Egan conducted the disciplinary hearing in a biased manner, and he referred to the following comments in the transcripts as evidence of this: *"So if I say 'Hey you stole those files … your response is … they're mine";* and questioning whether the claimant was going *"… to barter them for something? I mean use them as leverage?"*

76. Mr Egan's evidence was that *"it's difficult for me to do this meeting and wear this hat and separate it from everything else; and yes I underperformed and so yes, can see it would have been better if someone else had done it."*; he argued that *"I did my best to stay impartial … I hoped I would hear something new that would shine a light, and this did not happen."* He argued that as a small company under cost pressures *"… In my mind it seemed that the issues were so ridiculous, to give them more air was not going to get us any further down the road. I found the whole thing preposterous. And pretty black and white…".*

77. There were emails to and fro about these issues, both the claimant and Mr Egan reiterating their stances. In one email the claimant stated the respondent had been "*aware since the start of my employment"* he had hosted 3rd party files on its IT systems *"and has at not stage previously expressed any concerns"* about this, and in fact had *"insisted"* these files be hosted on its systems; other

colleagues had been known to have acted similarly and had not been disciplined. In his response Mr Egan said that if the files are *"innocent and innocuous … then I do not understand why you are so reluctant to provide them"* (330-2). In fact, the claimant had retuned the files when asked to do soon 22 October.

78. In his evidence Mr Egan accepted that the 2016 and 2017 emails show it was *"… pretty clear, I would have to say that I would have known"* that the spreadsheets were created prior to the claimant joining *"… I would have assumed [he] had permission to do so [from previous employer], but its undeniable [that I knew]".* He argued that the issue of where they had come from was a *"sideshow to the core issue, the deletion of all files, some of which predated your arrival, to gain leverage. … within several days he deletes 100s of files. I do not understand the rationale, it's some kind of attack".*

79. The claimant's case is that he only intended to remove files he had brought to the business but *"in haste"* he also removed a small number of other files he created when working for the respondent. He says that he made this point during the hearings, for example on the 22 October call. Mr Egan argued that many of the files had been created by others; *"I asked him [who had created them] … and in my mind I did not think he had gone through large folder and selected ones he felt was his. … I knew that some of it was ours and I wanted to get to the bottom and understand the magnitude – it would have been best to tell me, what is the percentage. He did not - he ignored the request. This led me to believe that more were ours than his….".*

80. In his evidence Mr Egan accepted that the files were restored to the system by the claimant, but that it was a *"shambolic handover",* that the claimant did not go through the files and establish which may have been the respondents. He said that the claimant was running huge data files as part of his research. He said that he wanted to find the recently used files, that with the claimant leaving, *"I am thinking of the business, and we need to have a handover, so I wanted to try to find the most recently used files."*

81. Mr Egan reiterated that the handover with X also caused him concern, because the claimant had not made it clear the files were not there *"so it was a total waste of time … no one knows where the files are…".* On the claimant's reference to removing the files because they were not the respondent's IP (page 258), Mr Egan argued that this *"feels like extortion - he has taken files and then saying we have a conversation about giving them back."* Mr Egan said that he *"did not disregard"* the fact that the claimant had mentioned the files to X, also that the claimant did agree to return the files when instructed to do so.

82. But, said Mr Egan, what was in his mind when considering the issue as one of gross misconduct is that this was *"malicious intent - to frustrate the HR [redundancy] process and cause as much damage as he could…".* He argued that the claimant threw *"three grenades"*: bringing up the allegations of regulatory breach; contacting clients about his departure when told not to; deleting data and then pretending it's not there. He argued that the claimant's aim was to gain *"a load of money";* he argued that this was his *"judgment call on*

the basis of events that had occurred and how [the claimant] acted during the process".

83. On 29 October the claimant asked for and was granted access to the respondent's Nextcloud system (303). There was then an issue with access as the claimant did not have the relevant programmes (309).

84. On the same day Mr Egan asked X for his account of the handover, and then emailed X the account of the conversation asking him to confirm *"they are accurate or amend where needed?"* This account states that the claimant had confirmed to X he had moved one file (the property file) but had queried why others were not appearing on the system, that the claimant *" wasn't sure why they weren't [there]"* (353).

85. Mr Egan said that he *"never got to the bottom"* of what spreadsheets had been developed by the claimant and where they had been developed, so *"… we decided we would not try to reproduce C's work - it was too fraught"*. He argued that the claimant had been given two weeks to provide this information, he did not give any progress updates, and did not provide any information on the files. He said that the nature of the product *"pivoted"* after the claimant had left, *".. the handover was not effective, the data was very technical, clients were are not paying for it, the role was redundant, and this was not gold-dust information that we need to maintain and continue."*

86. It was put to Mr Egan that a salesperson 'M' had left the company with information stored on the company systems including contact data, without being disciplined. Mr Egan said he had little knowledge of this, but that *"you would expect a salesperson to bring contacts with them…".*

87. Another employee the claimant considers was dealt with differently in a similar situation some years earlier by Mr Egan, 'C'. There was an exit process with C involving lawyers. Mr Egan summarised the issue as follows: *"… And I said [to C] where's the data and she says it's on my PC and you have not got access, and I said you have to give it, and she says no. There were lawyers letters saying this is employer's IP, and she consulted with lawyer and agreed to send it back."* Mr Egan stated that the difference between this and what the claimant did was that *"[C] did not remove a great swath of information when the HR dispute became contentious, and you did - that's a huge difference.*"

88. On 29 October 2019 the claimant submitted a complaint against Mr Egan to Mr Benton, who was scheduled to hear the appeal against redundancy dismissal, saying that Mr Egan had engaged in *"repeatedly dishonest … threatening and bullying behaviour"*, including lying to clients about the reason for his absence; lying about the hosting of files issue; demanding he come to the office to attend disciplinary investigatory meetings without notice. He said he was concerned that the allegations of gross misconduct, and a failure to substantiate these claims, *"are a response to a disclosure I made to [Mr Egan] on September 20th"* (354). Mr Benton suggested discussing these concerns at the end of the appeal hearing; he did not respond to two further emails from the claimant pressing for another manager he could contact about these issues.

89. Sometime following the claimant's disclosure on 20 September 2019, Mr Egan sought advice from a former director of a predecessor company to the respondent, who now had his own company providing compliance services. Mr Egan summed up the internal investigation in an email dated 30 October 2019: two research reports had referenced the sister-company bank in question, that the 2nd report was withdrawn based on a senior management decision in Hong Kong that it was *"not sensible to cover a group company".* The adviser's response was that there is *"no contractual obligation"* to clients to produce this research, and *"… As your clients are professional clients and are not relying on you to provide such material I see no compliance violation in retracting the research note."* (372-3).

90. On 4 November 2019 Mr Egan informed the claimant of this outcome saying *"the issue you have reported was noted, investigated and dealt with appropriately… and signed off by outside compliance consultants."* (377-8). Mr Egan denied that he had failed to progress an investigation: he started an investigation into this on 20 September, 3 days after the disclosure (new document 5) but he argues that the consultant did not respond to numerous chasers to move the investigation on, that any delay was on the part of the consultant.

91. On 4 November, Mr Egan again asked for *"a mark-up"* of the files the claimant had deleted, and emails he had removed from the system; *"If these items are not supplied by the end of the day, I will base my decision on the information that I have."* (333).

92. The claimant's case is that he only got access on 29 October to the sheet, it was a huge sheet to go through to identify and establish the nature of each file. *"I was then told on 4 November that he was finishing investigation, and if I had not finished marking it up that day he would make his decision...".*

93. The claimant's final date of employment was 4 November 2019.

94. The claimant's redundancy appeal was considered at a hearing on 7 November, after delay caused in part by difficulty getting a senior director (Mr Bob Benton, the one non-exec Director based in the UK) to hear the appeal, and in part by claimant job interviews. It was agreed at this hearing that Mr Yeung, based in HK, would hear the claimant's grievance.

95. On 11 November 2019 the respondent notified the FSA of the claimant's dismissal, citing the reason as redundancy, and stating that the respondent was in the process of completing a disciplinary process against the claimant (894).

96. On 15 November 2019 the outcome of the disciplinary was given to the claimant (435-9). Allegation 1: part of this allegation, talking material from previous employers and storing and using the material during his employment, was dismissed on grounds of insufficient evidence. Mr Egan stated that the claimant had been asked to categorise the files, *"…however you have not done this so I do not know which, if any files are [from previous employer]"*

97. The 2nd part of this allegation related to the removal and deletion of material from NextCloud. Mr Egan characterised the claimant's explanation that they were *"your files"* that he wanted to take files from the system, *"and you inadvertently took some files which were not "yours" and you apologise"* for this. Mr Egan states *"I do not accept"* the claimant's explanation. He argues that *"you continue to have the mistaken belief that some files on the company's IT system belong to you. The starting point is that all files stored on the company's IT system belongs to the company. Also what you create belongs to your employer. … The correct course would have been for you to discuss this … and then to take material if your employer consents to this…."*. While Mr Egan accepts that the claimant retuned the material and apologised *"… it is clear that you reluctantly gave the material back after a lot of insistence on my part and your apology was a limited one…"* . Mr Egan refers to contradictions between the claimant and X's account of their meeting. This allegation was upheld.

98. Allegations 2 and 3, that the claimant refused a reasonable instruction to attend the office on 22 October and that he had refused to follow a reasonable instruction not to contact clients, were also upheld. Mr Egan concluded that the claimant's actions amounted to gross misconduct.

99. The letter stated that Mr Egan had considered whether he should continue with the disciplinary process given the claimant had left the firm; *"I think that the right thing to do is … to finish the process…".* He concluded that the claimant's actions amounted to gross misconduct, taking account is the seriousness *of "each of the upheld allegations, particularly allegation 1".*

100. On allegation 2, the claimant argued that Mr Egan did not address the reasons he had given for not wanting to attend the meeting, that he had been bullied at a previous meeting, he had no time to prepare. Mr Egan argued that the meeting was to discuss the missing files *"I asked him to come in, it was an urgent investigation meeting. … I felt we had to take a firm line so I wanted to stress the importance and seriousness … I was trying to keep this under control … It is ironic [the claimant] accuses me of bullying, it was [him] not me …".*

101. The claimant was given a right of appeal within 5 working days (435-9); this is as set out in the disciplinary policy. Me Egan argued that this time scale was given because *"Throughout the process it was very difficult to get things done, and it was stretching beyond a realistic timeframe for resolution."*

102. Following his dismissal the respondent referred the claimant to the FCA, its report stating that the claimant would have been dismissed (had he not been made redundant) for gross misconduct as a result of *"the unauthorised transferring and deletion of approximately 1000 files … and subsequent attempted cover-up … refusal to follow instructions relating to attendance in the office and communications with clients."* (494-5).

103. Mr Egan was asked in evidence whether there was a policy relating to monitoring of emails, which he said the respondent had been doing with the claimant from an early stage in the process, as he was regarded as a *"disgruntled"* employee. He was not aware whether there was a policy which informed employees their

emails may be monitored. Similarly, he was unaware whether there was a policy regarding the use of Nextcloud, or relating to content created by an employee during their employment. Mr Egan did not know, but argued that there was *"no need to have policies which prescribe staff taking IP from company as this is theft"*.

104. In the days following the claimant raised a concern about the disciplinary policy in use. On 22 November 2019 he stated that he wished to appeal, and that he would send his grounds of appeal 'shortly'. He raised some questions. He was given the disciplinary policy and reminded of the 5 working day deadline to appeal, as set out in the policy (562-3).

105. The dismissal of appeal against redundancy was sent to the claimant on 26 November 2020. In a detailed and lengthy decision 8 page decision, Mr Benton considered and reached conclusions on all the points raised by the claimant in his appeal. Mr Benton concluded that there was a genuine redundancy requirement *"given the background financial circumstances"*; the claimant was properly selected for redundancy; and the consultation process was reasonable (450-8).

106. The claimant submitted a 12 page detailed grounds of appeal on 2 December 2019 against the gross misconduct findings. He argued that accusations were made at the outset by Mr Egan, that the company behaved unreasonably in the process, including a failure to obtain a witness statement from X

107. At appeal stage, Mr Yeung said he disregarded the '5 day' issue, and he dealt with the appeal in full. He listened to all of the transcripts of all of the calls and had a 1¾ hour meeting with the claimant, thereafter listening again to parts of the meeting transcripts. He argued he received no steer from Mr Egan, instead forming his own opinion on the issues, in particular on whether the claimant had finding that the claimant had committed gross misconduct. He says that he "struggled to understand" the claimant's answers. In particular he had one question *"when he removed those files what exactly was in his mind - because he felt they belonged to him, to his employer or to who? … I struggled to understand the answer, that he does not think it belongs to anyone. So who does it belongs to - and he said he did not know. This is a very important question - it was not clear. I needed to hear and he did not give me the answer. … It did not add up. It is not logical. Based on this explanation and evidence he removed those files 2 days after redundancy, he knew he did something wrong and very badly wrong - instead of coming clean and saying sorry and give back and. I will sort this out - this would have been the end of it."*

108. Mr Yeung also argued that the claimant was *"trying to wriggle out of it … he was refusing to accept instructions."* He said that Mr Egan made it clear that he was not to talk to clients, and when he did so he argued it was not clear in emails. *"Whether removing files … he tried to argue his way out instead of accepting what was wrong … and this is the basis of my decision not to uphold appeal.*" He argued that any apology was not genuine; an example being that he said he would sort out which files belongs to who; but the claimant did not do so.

109. Mr Yeung also argued that it was *"clear"* that the motivation behind his disclosure was because he had been told of redundancy; "*I can only come to conclusion that this is the only way you can get something out of it. … You were determined to frustrate, and make up whistleblowing. … Unfortunately, you were removing deleting stealing files, and no plausible explanation for thism which resulted in disciplinary."*

110. On not being given X's statement, Mr Yeung did not know why this was – he said that he read the statements and spoke to X, but did not deal with provision of documents.

111. One issue in the case is whether the respondent followed its own whistleblowing policy. On 4 April 2017 the respondent forwarded to all staff its 'compliance manual'; its policy contained a short procedure on whistleblowing: employees were to full in a form and the compliance officer will keep the employee *"updated with the outcome of any actions taken"* (177-179). There is also a policy at 180. Which policy was the applicable policy and whether it was complied with became a significant issue in the case… I concluded that the policy at 177-179 was the policy in place – the one at 180 s draft. Mr Egan argued that the claimant was not updated, because "he and I were discussing issues several times a week, and frankly he never asked. … I would have said if he had asked….

112. The claimant was not given sight of various documents during the disciplinary and appeal process, including the email containing Mr Egan' account of his conversation with X which he first saw during the disclosure process. Mr Egan said that he was told by lawyers he did not have to, that to do so "*would lead to further cul-de-sacs and arguments"* with the claimant, that he was *"trying to run a business that was losing money, and I could not drop everything to engage in a battle, I was trying to protect company from this."*

113. On the disciplinary policy, this was created on 21 October 2019, the day before the disciplinary hearing; the claimant asked for but was not given earlier versions of the policy. Mr Egan argued that he was being guided by advisers through the process, that he had an old policy ad was given the current policy by his advisers, that they were relying on.

Closing submissions

114. Mr McNerney and the claimant made oral submissions. Their arguments are incorporated into the 'conclusions section below.

The Law

115. Employment Rights Act 1996 – Pt.IVA Protected Disclosures & Pt.V Detriment

s.43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

s.43B Disclosures qualifying for protection.

1. In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

a. …
b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
c. …

s.43C Disclosure to employer or other responsible person.

1. A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –
a. to his employer
b. …

s.47B Protected disclosures.

1. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

s.48 Enforcement

1. An employee may present a complaint to an employment tribunal that he has been subjected to a detriment

2. … it is for the employer to show the ground on which any act, or deliberate failure to act, was done

3. An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

116. <u>Employment Rights Act 1996 – Pt X Dismissal</u>

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

   a. the reason (or, if more than one, the principal reason) for the dismissal, and
   b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it—

   a. …
   b. …
   c. is that the employee was redundant…

3. ….
4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

   a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
   b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

1. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Relevant case law

117. *Unfair dismissal – redundancy*

a. *Iceland Frozen Foods v Jones [1982] IRLR 439* (a conduct case, the test is applicable to redundancy) –
   i. the starting point should always be the words of s 98(4) themselves

ii. in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;
iii. in judging the reasonableness of the employer's conduct the tribunal must not substitute its decision of what is the right course to adopt for that of the employer;
iv. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
v. the function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

b. Berkeley Catering Ltd v Jackson *UKEAT/0074/20* (27 November 2020: the existence of a redundancy situation is one of fact, unaffected by what may or may not have been the employer's motivation. Where there are allegations that a redundancy was being used cynically to get rid of an employee, that is to be dealt with by concentration on whether the redundancy was the real reason for dismissal and/or whether the dismissal was unfair, *not* by stretching the basic concept of 'redundancy' itself, which is an objective concept. The test is: (1) was that redundancy the reason or principal reason for the dismissal and (2) if so, was the dismissal fair?

c. *Williams v Compair Maxam Ltd [1982] IRLR 83* EAT (a case where there was a recognised TU, the principal holds for consultation with individual employees):

i. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

ii. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

iii. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish

criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

iv. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

v. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

Not all factors are present in every case but "these principles [are] to be departed from only where some good reason is shown to justify such departure."

d. *Taymech v Ryan EAT/663/94* in which he said '…the question of how the pool should be defined is primarily a matter for the employer to determine. It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem'.

e. *Capita Hartshead Ltd v Byard* [2012] IRLR 814*:* a pool of one may not necessarily be unfair. The test of whether an employer has selected a correct pool of candidates who are candidates for redundancy are:

i. "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83*);

ii. "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*);

iii. "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan EAT/663/94*);

iv. the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that

v. even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.''

f. *Wrexham Golf Club v Ingham UKEAT/0190/12*: A decision to have a pool of one – a tribunal to intervene in an employer's decision to have a pool of one would be an exceptional intervention; in effect only if the employer's decision was outside of the range of reasonable responses – a pool of one can be "an underlying reality".

g. *Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, HL*: *''… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'…''*

h. *Dyke v Hereford and Worcester County Council [1989] ICR 800:* the importance of consultation 'cannot be overemphasised

i. *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72*: "It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at *[1988] Crown Office Digest p 19*, when he said

'Fair consultation means:

(*a*) consultation when the proposals are still at a formative stage;
(*b*) adequate information on which to respond;
(*c*) adequate time in which to respond;
(*d*) conscientious consideration by an authority of the response to consultation.''

118. Public Interest Disclosure

a. *Darnton v University of Surrey* [2003] IRLR 133 *EAT* - The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

b. *Parsons v Airplus International Ltd UKEAT/0111/17* - a disclosure does not have to be either wholly in the public interest or wholly from self-interest, but a tribunal can find that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The EAT argued (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

c. *Babula v Waltham Forest College [2007] EWCA Civ 174* - "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

d. *Ibrahim v HCA International [2019] EWCA Civ 207* - the questions of whether the claimant had a genuine belief in the disclosure and had reasonable grounds for so believing, do not include an analysis of the claimant's motivations for making the disclosure, *"the necessary belief is simply that the disclosure was in the public interest …".*

e. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT* – the EAT provided the following guidance to tribunals:

   i. Each disclosure should be separately identified by reference to date and content.
   ii. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.
   iii. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

iv. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.
v. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest.
vi. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant…
vii. The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

f. *Harrow London Borough v Knight [2003] IRLR 140, EAT - The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the act complained of.

g. *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73* – the tribunal must consider the employer's *motivation* for taking a particular course of action after a whistleblowing allegation; an employer who is motivated to act for reasons unconnected to the allegation will not have subjected to the employee to an unlawful detriment.

h. *Fecitt v NHS Manchester [2012] ICR 372 CA - s.48c* puts the burden on the employer to show on the balance of probabilities that the act complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee.

i. *Kuzel v Roche Products Ltd [2008] IRLR 530*, *CA* (a dismissal case but which the CA said *"as a proposition of logic"* must apply to detriment cases) - if the employer fails to show an innocent ground or purpose, the tribunal *may* draw an adverse inference and find liability but is not legally bound to do so. *"Accordingly, if a tribunal rejects the employer's purported reason for dismissal [or detriment], it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. However, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side."*

j. *Yewdall v Secretary of State for Work and Pensions UKEAT/0071/05* – the initial burden on the claimant to show a prima facie case that they have been subjected to a detriment because of their protected act, *"… the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained"*.

k. *Panayiotou v Kernaghan [2014] IRLR 500* - it is a defence that the reason for the detrimental treatment was not the doing of the protected act in question, but the unacceptable way in which it was made – an employee's dismissal in part because of an obsessive pursuit of PIDs was "in no sense whatsoever connected to the PIDs: *"There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. … Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."*

l. Royal Mail Group Ltd v Jhuti [2019] All ER (D) 165 - where a manager determined an employee should be dismissed for a reason, but hid it behind an invented reason which the decision-maker adopted, the reason for the dismissal was the hidden reason, rather than the invented reason.

Conclusions on the evidence and the law

Unfair dismissal

119. It is accepted that the initial decision to make the claimant redundant was taken prior to his allegations of whistleblowing. The claimant argues that the respondent acted unfairly, outside of the range of reasonable responses of a similar employer. In his closing arguments the claimant identified ways in which the employer did not act reasonably, specifying the following - Mr Egan failed to consider any other way of making costs savings; that a reasonable employer would have considered others for the pool, including a colleague who had been considered for redundancy in the past (X).

The reason for dismissal:

120. I concluded that the claimant's dismissal was on grounds of redundancy as asserted by the respondent (and not seriously challenged by the claimant). The reason given by Mr Egan for redundancies were the need for cost savings, given

the fact that the company was unprofitable without the support of its parent company. I accepted in full Mr Egan's evidence that costs savings were necessary, and that the claimant's role quickly became of focus of potential savings because it was a stand-alone role, and there was a genuine belief that the respondent could save costs by removing the claimant's role and replacing his work with that of colleagues in the parent company in China.

The pool:

121. The selection of the claimant in a pool of one. I accepted Mr Egan's evidence that it was the claimant's role which was identified because his work was not directly profitable (i.e. his work was not leading directly to sales), and similar research could as far as the respondent was concerned be produced by employees of its parent company in China.

122. The claimant suggested his role could be saved by another employee (X) being made redundant instead – bumping – that this is evidence of too narrow a focus his role. I again accepted the respondent's rationale that X had sales experience and had relevant experience in property, and whose salary was a lot less than the claimant's, Again, I concluded that the decision not to make X (or anyone else) redundant was within the range of reasonable responses.

123. The claimant argues that his salary saving did not in any way go to the significant losses experienced by the company, that more staff could have been put at risk. Alternatively he suggested a salary reduction, that this was not properly considered. Again, the legal test is what would another similar employer have done – and I concluded that the respondent was entitled to take the view that it did not need his role any longer, that there was no little benefit in keeping the claimant in role at a reduced salary, or making another employee redundant.

Consultation process

124. There were several calls in which the claimant made suggestions to save his role. These were considered by Mr Egan, albeit some were dismissed as impracticable with little thought process.

125. But, the context of the consultation process was that a decision had been made to take steps to save costs by making at least one employee redundant, and for the respondent there was a clear logic to the claimant's role no longer being required. Accordingly, I found that a similar sized reasonable employer, in a similar position, would have required serious persuasion of the merits of retaining the role. The claimant was given opportunity to make suggestions, and he made them. I concluded that the respondent genuinely believed that none of the claimant's plans were practicable, and I concluded that this would have been the genuine belief of many employers in this situation.

126. Given the number of consultation calls, the need for redundancies and the lack of persuasive arguments by the claimant, I concluded that the respondent's consultation process was within the range of reasonable responses.

127. On the failure to offer the claimant alternative employment. The claimant has not put forward any evidence that there was a suitable role for him, again given his specialism, the fact that his work could be undertaken elsewhere, the lack of experience to do any other role. I concluded that the respondent took the view that there was no other suitable role, and the claimant did not suggest otherwise during the process.

Appeal

128. At redundancy appeal stage I concluded that the respondent acted reasonably – Mr Benton considered the issues raised by the claimant and concluded the decision was a genuine redundancy. The claimant argues that discussions between Mr Egan and Mr Benton show that this process was tainted and unfair. He argues that the respondent failed to comply with its own policy. I concluded however that the appeal properly considered the claimant's arguments and found that they were not

Conclusions on redundancy:

129. Noting that it is only in rare circumstances that a Tribunal will can overturn a decision taken on the composition of the pool if that decision had been taken by the employer after reasonable consideration, I found that a pool of one would have been adopted in similar circumstances by similar companies, and that the issues raised by the claimant in the consultation process would have been treated in the same way. The respondent acted within the range of reasonable responses.

130. The claim of unfair dismissal therefore fails and is dismissed.

Whistleblowing detriment claims

131. The respondent has accepted that the claimant had a genuine and reasonable belief the issues he was raising were in the public interest. As Mr McNerney said in his closing submission, the only issue to consider at liability is to *"establish causation for each of the detriments".* It follows that the claimant, in his statement of 20 September 2019 and the provision of a transcript containing the same statement on 24 September 2019, did make a qualifying protected disclosure.

132. Mr McNerney suggested on day 3 morning that the respondent may rely on a bad faith argument on the timing of his disclosures; but to be clear (if it was not clear at the time), the Enterprise and Regulatory Reform Act 2013, which amended s.49 ERA, makes 'bad faith' an element to be considered at remedy stage, not liability. This means that the timing of the disclosure, and whether or not it was made 'in bad faith' – i.e. to stymie or delay the redundancy process or obtain a bigger payment as alleged by the respondent – is not a legal issue to be determined at liability stage, and I make no findings of fact on this issue.

133. The principle issue to determine is therefore the following: were any of the alleged detriments done on the ground that the claimant had made these disclosures? What was the mental process of Mr Egan and others in making the

decisions? Did the protected acts 'materially influence' (i.e. have a more than a trivial influence) on the decisions taken?

134. I have considered some of the allegations out of order, instead dealing with the allegations of detriment issues thematically – the 'redundancy' detriments, the 'disciplinary' alleged detriments, and 'other' detriments.

Redundancy detriments

Detriment 1- the claimant was criticised on 24 September for requesting time changes to the redundancy consultation meetings.

135. It appears that this is reference to the first meeting being postponed to 20 September. There is no evidence that the claimant was criticised during the course of the 24 September meeting, it does not appear as an issue in his witness statement and questions were not put to Mr Egan about this issue. This allegation is not upheld as no evidence has been provided in its support.

Detriment 3 - on 26 September 2019 during a redundancy consultation meeting with Mr Egan C was criticised for responding to messages from a colleague and communicating with an ex-colleague:

136. The claimant agrees that by this date he had been told not to communicate externally about his potential redundancy. Mr Egan received information suggesting the claimant had contacted an ex-colleague. The claimant had an explanation for this - he had been contacted and was responding to messages clarifying his whereabouts. I accept that Mr Egan was critical of the claimant, however I did not accept that this was in Mr Egan's mind linked to his whistleblowing disclosure in Mr Egan's mind.

137. I concluded that Mr Egan had taken a decision from the outset of the process to control information about the redundancy, prior to his whistleblowing allegations, that this would have been the case even if the claimant had not made a whistleblowing disclosure. This is not an uncommon position for an employer to take, and I considered that this was the case with the claimant. Accordingly this allegation is not upheld.

Detriment 5 – on 4 October 2019 C's role was made redundant. R refused to offer C alternatives to redundancy which he had proposed (move to another office, voluntary pay cut, be 'bumped down' to a more junior role):

138. As stated above, I concluded that the respondent had a settled opinion prior to Mr Egan's consultation meeting with the claimant that his role would be made redundant, and I also concluded that the consultation discussions offered no alternative role which the respondent could seriously consider as an appropriate alternative. The rejection of a pay cut of moving to another office were not seriously considered as alternatives. I concluded that this had nothing whatsoever to do with the claimant's whistleblowing allegations, it was because there were no alternatives to seriously consider as realistic options.

Detriment 19 – on 26 November 2019 refusing his appeal against redundancy:

139. When considering the appeal against dismissal, I concluded that Mr Benton considered only the merits of the original decision to make the claimant's post redundant and the arguments the claimant raised in his appeal. There was no evidence he was influenced by Mr Egan. Mr Benton's decision was in no way influenced by the claimant's whistleblowing disclosure. This allegation therefore fails.

Disciplinary-related detriments

140. Mr McNerney argued that the evidence of the respondent's witnesses was straightforward, that it was apparent that none of the disciplinary detriments were on grounds of whistleblowing, that the claimant cannot say that the reason for the detriments were because of his public interest disclosures. Mr McNerney accepted that in an ideal world the disciplinary officer would not have been the investigator; and that statements (eg X's statement) would have been given to the claimant, but he argued that this was not caused by the claimant's disclosures.

Detriment 2 – since 20 September 2019 R began combing through all of the C's actions on the R's systems, calls and/or e-mails to identify any basis to accuse him of gross misconduct, and to commence disciplinary proceedings against him:

141. The decision to monitor the claimant's emails shortly after the meeting with the claimant was because, in Mr Egan's view, he was likely a disgruntled employee.

142. Why was this? Mr Egan's view was that the claimant had made an 'implicit threat' in making a public interest disclosure to him, and he saw this linked directly to the decision to make the claimant redundant, in his own mind this was a 'suspicious correlation'. He considered that there may be a risk the claimant could do some wrong as a consequence.

143. I concluded based on this evidence that Mr Egan saw the claimant as a disgruntled employee who may do some harm to the respondent, and that he took this view only after the claimant's disclosure – the implicit threat. I concluded that Mr Egan had some concerns that the claimant may as a consequence take data or may contact clients, (and in fact his concerns were in part realised).

144. No evidence was provided that other employees' data was monitored when they were undergoing a potentially contentious dismissal, and Mr Egan was unaware whether there was any contractual provision or any other kind of notification at the time informing employees that the respondent could monitor emails.

145. I concluded that the fact that the claimant had made allegations against his employer was a significant and material factor in the decision to monitor the claimant's emails.

146. Was this monitoring a 'detriment'? I concluded that monitoring of emails without the knowledge of the employee because an employer is suspicious of the

employee is a detriment, that the claimant was targeted. I concluded that the monitoring was an unlawful detriment.

147. Accordingly, this allegation of whistleblowing detriment succeeds,

Detriments 6 – 8: On 16 October 2019 C was required to attend a disciplinary investigatory meeting without notice, or right of accompaniment; the claimant was bullied – being mocked and demanding the claimant attend work to address the allegations, and conducting the meeting without giving C sight of the evidence:

148. The 16 October 2019 call was in part an investigatory meeting to the allegation that the claimant had been contacting clients. Its other purpose was to discuss the handover which was to take place the next day.

149. Generally, it is reasonable for employers to ask employees questions about issues of potential concern without a TU rep and without notice of the precise nature of the investigation. I concluded that Mr Egan's decision not to allow accompaniment or without giving sight of evidence in advance was not linked to the claimant's whistleblowing, that this is a decision which would have been taken in any event. There was, at this date, no real evidence to disclose in any event, Mr Egan's main concerns were organising the handover and enquiring about contacts made by the claimant and the message that the claimant was putting out.

150. I concluded that Mr Egan's decision to adopt this process was in no- way influenced by the claimant's whistleblowing.

151. During the meeting, the claimant was mocked in a belittling accent. Was this an act linked to the claimant's whistleblowing? I concluded not – this was an off the cuff remark because of Mr Egan's frustration during this call with what the claimant was telling him – it was not motivated by any underlying issue. Clearly, this was a remark which should not have been made, equally, it was not a whistleblowing detriment.

152. It follows that these allegations of detriment 6-8 fail and are dismissed.

Detriments 9 – 11: On 21 and 22 October 2019 C was required by Mr Egan to answer a disciplinary case regarding his use of files on R's systems, without the details of these allegations being provided in advance or in writing, or having a colleague present, where other employees had not been disciplined in similar circumstances.

153. By 21 October Mr Egan had information that the claimant had deleted several hundred files from the respondent's system without the respondent's knowledge or authorisation. The handover meeting with X had not gone to plan. At this early stage Mr Egan had no way of knowing the reasons for the claimant deleting documents. He was entitled to have concerns and he was entitled to ask the claimant questions.

154. In particular, the calls on 19 and 20 October were was not a disciplinary hearing; the latter was an investigation meeting. I did not consider that asking these

questions amounted to a detriment, as at this stage Mr Egan was seeking to find out what had occurred. He had no explanation from the claimant and had no real knowledge what the deleted files were; all he knew was that files had been deleted.

155. I accedpted that at this stage Mr Egan believed that the claimant had doe something wrong. But that does not mean that the invesgation was linked to the claimant's whistleblowing. At an investigation hearing there is no 'fairness' requirement to have a colleague present.

156. I concluded that the decision to hold the investigation meeting on 20 October was in no way connected to the claimant's whistleblowing; instead it was because Mr Egan was genuinely concerned at this date about the deleted files and what they contained.

157. Accordingly, allegations 9 – 11 fail and are dismissed.

Detriment 12 – 15 – disciplinary hearing on 28 October 2019 – conducted by Mr Egan, it was conducted in a biased manner with leading statements not backed by evidence, and without giving C sight of X's statement, allegations of gross misconduct despite being aware of and permitting C to store files created at previous employers.

158. Mr Egan wrote to the claimant later in the day after the 22 October investigation meeting saying that the claimant's answers were *"potentially unsatisfactory"* – as he had said he had *"taken material from previous employer"* and believed that it was his own. This is not in fact what the claimant had said. The claimant had told Mr Egan that he had concerns about who owned the files, as some of them had been created by him at previous employers.

159. I concluded that, as soon as Mr Egan found out that the claimant had deleted files from the respondent's system, he had a settled view that the claimant had committed an act of misconduct in doing so. As he said at the meeting on 22 October: *"it looks like company theft … you've deleted all these records … maliciously"*. I concluded that this was his settled view from the 20 October meeting onwards.

160. I also concluded that at this stage, 20 October onwards, Mr Egan had in his mind the following factors: his anger at what he considered to be the claimant's obstructionism in drawing out the process for ulterior motives; and a significant reason Mr Egan believed that the claimant was being obstructionist was because of what he regarded as a vexatious and unreasonable complaint of a regulatory breach, an allegation he considered had been brought in bad faith. I found that the key word used by Mr Egan was "maliciously" – that he considered the claimant had a motivation above and beyond 'mere' theft.

161. I concluded that Mr Egan considered the claimant's actions were ulterior from the day he was informed of redundancy, from making the whistleblowing disclosure onwards. I concluded that this belief that the claimant was acting with ulterior and malicious motives fed into the decision to discipline him. I concluded that the claimant's whistleblowing had a material impact on Mr Egan's wholly

negative view of the claimant and on the decision to institute a disciplinary hearing.

162. At the same time, there was a degree of confusion in Mr Egan's mind. As he wrote to the claimant on 25 October, he wanted clarity on where the files had originated – were they the claimant's, the respondent's or those of a previous employer? This was a question which needed to be considered in an investigation. If in fact the claimant had brought many of the files to the role, and if the claimant genuinely believed they were his own, then any allegation needed to be framed in this light. But, Mr Egan was also of the view that the claimant's actions had been malicious, and this view was independent of any question of ownership of the files, it was instead because of the claimant's whistleblowing complaints.

163. The disciplinary hearing on 28 October 2019 was conducted by Mr Egan. Mr Egan says that he did not want to undertake this hearing, but had no choice, he also accepts that he was frustrated. I concluded that the reason Mr Egan decided to conduct the disciplinary hearing because he was frustrated by the claimant's conduct, including the fact he had whistleblown – this was part of his concern that the claimant was acting in bad faith and with malice.

164. Mr Egan's belief was that the claimant had been maliciously stealing documents, and as a consequence he believed that he was the right person to undertake the disciplinary process. No proper thought was given to whether someone else should do the hearing – whether based in the UK or in China – or whether an outside consultant should be used. Again, the reason was Mr Egan's view that the claimant was acting maliciously, this was intrinsically linked to his view that the claimant's whistleblowing was malicious. If he had wanted, I considered that Mr Egan could and would have found another person to undertake the disciplinary hearing.

165. The claimant raised the fact that the respondent was aware he had brought files into the business, that he had created some of these files at previous employers, that he had IP concerns, but was willing to share them. This, for Mr Egan was not genuine – he referred to the claimant seeking to barter the documents to gain leverage.

166. I concluded that at no time was there proper consideration given to the fact that the claimant *did* in fact create many of the files prior to his joining the respondent, and no consideration was given to the prospect that he genuinely believed that many of these files did belong to him. While Mr Egan may not recollected events in 2015/6, the claimant brought this up at and after the 28 October meeting. At no time did Mr Egan stop and consider the information he was aware of – that at the outset of his employment the claimant had downloaded a significant number of spreadsheets that he had brought with him to this employment, and that the claimant may have had a point in saying – these are not 'yours', but also that he was not sure where the IP lies in these documents.

167. In concluding this, I note that the respondent was receiving legal advice, and Mr Egan on several occasions in his evidence referred to this in reliance on the

decisions he had taken. Mr Egan was aware that the claimant had developed tools to undertake his role. The claimant's position was that he had deleted these, and that in addition he had inadvertently deleted other files. It is accepted that he restored all deleted files back to the system.

168. The respondent never got to the bottom of what was in these files. The claimant's case is that they were in the main spreadsheets which he used to process information to enable him to do his role. They were as he put it idiosyncratic and not easily understood by his colleagues – in essence they were no use to the respondent. The respondent never properly interrogated the files to find out whether or not what the claimant was saying was accurate. Mr Egan admitted the files were basically unusable. He instead sought from the claimant proof that the files were not stolen.

169. The test, again, is whether the claimant's public interest disclosures in any way influenced Mr Egan to take this position. I concluded that they did, and that the following was materially influenced by the fact that the claimant had made disclosures:
    - the failure to actually investigate what the files contained
    - the failure to determine whether the claimant was correct that at least the majority of the files he had deleted were files he had created
    - the conclusion that the claimant was trying to derail the process, act maliciously, and effectively extort a settlement from the respondent.

170. I concluded that the reason why Mr Egan did not consider the claimant's explanation was because he was unwilling to believe any explanation put forward by the claimant, because of his view that the claimant had acted maliciously in deleting the files and was continuing to act maliciously (to gain leverage) in asserting that the files did not belong to the respondent.

171. I noted that the claimant was told that the 29 October meeting would be to determine which were company related files. However, it appears that this did not occur. I did not accept Mr Egan's evidence that he hoped to find evidence favourable to the claimant. It was, for him clear from the outset, and a significant reason for this was Mr Egan's negative attitude with the claimant for his obstructionism, a large part of which was his whistleblowing.

172. I did not accept that the failure to provide the claimant with a statement from X was an act of whistleblowing detriment. No statement was given to the claimant, but he was told the substance of what X had said; I concluded that the failure to provide the statement was not on grounds of the claimant's whistleblowing, as the respondent would have acted similarly absent the claimant's allegations.

173. Accordingly the following allegations within 12-15 detriments succeed, the claimant was subjected to the following detriments as a consequence of his public interest disclosures:

    a. Mr Egan conducting the disciplinary hearing
    b. Conducting the disciplinary hearing in a biased manner

c. Making allegations of gross misconduct despite prior knowledge of the files' ownership

Detriment 16 – on 15 November 2019 Mr Egan found C guilty of gross misconduct; he disregarded C's offer to return files, and he disregarded C's explanation for removing the files, and he maintained a stance that C viewed the all the files as his own. Additionally, Mr Egan failed to consider the reasons C had given for not attending a meeting in person; and he failed to evidence C's actions in contacting clients disobeyed any instruction.

174. Mr Egan refers to the claimant as having a *"mistaken belief"* that the files belonged to him in the dismissal letter. It deals at length with issues of intellectual property and ownership of materials created, and says that the claimant is wrong in his assertions about the ownership of material. It says that the claimant's interactions with X show that he was covering up and being mendacious at handover, and this is used as evidence that the claimant had committed gross misconduct in deleting the emails.

175. At no time was the claimant's explanation properly investigated, that the majority of the files contained spreadsheets which he had created as a tool to undertake his role, that it consisted mainly of spreadsheets which populated data, that they were essentially bespoke tools.

176. I did not consider that the position adopted by Mr Egan, that it was clear that the files did not belong to the claimant, stood any scrutiny. Mr Egan asserted and maintained this position, but I consider he did so without any genuine belief that it was true. There appears to be was no contractual provision detailing ownership of such material. Mr Egan knew that at least some of these files had been downloaded by the claimant onto the respondent's systems at the outset of his employment with Mr Egan's say-so.

177. It is not unknown for employees to create tools to assist them in undertaking their role which have no proprietary or confidential information belonging to an employer. But Mr Egan essentially takes the view that the files belong to the respondent, unless the claimant could prove otherwise.

178. Had this been an issue of unfair dismissal, the failure to properly investigate this matter would have affected the fairness of the dismissal. But the test is - was the decision reached by Mr Egan in some way because of the claimant's whistleblowing? I concluded yes.

179. From the outset Mr Egan's view was not to believe the claimant, and this was I concluded motivated by his view that the claimant was acting with malice throughout. Mr Egan assumed the worst. As set out above, it was reasonable to commence an investigation, as a large number of files had been deleted, but an even handed investigation would have property considered the claimant's explanation that many of the files were his and a minority he deleted belonged to the respondent.

180. I accepted that the fact that the claimant had deleted files which were not his, and had not sought permission or informed his employer in advance that he was doing deleting any files, would have been alarming, and this would very likely have led to questions being asked of the claimant at a disciplinary investigation meeting. Also, X's answers to Mr Egan suggested that the claimant was potentially being misleading in the handover meeting, again an issue which would have led to questions about what was said and why.

181. But, the truth was that the vast majority of the files were tools created by the claimant to enable him to undertake his role, they contained no intellectual property belonging to the respondent. I accepted the claimant's evidence on this point, and he reiterated it in his closing argument, "a difference between spreadsheets I have created and the data populating the spreadsheets." I accepted that if not plugged into Wind, the spreadsheets are essentially useless. Mr Egan pointed out that the files were in reality of no use to the respondent. I concluded that these issues would have been addressed and properly investigated an even-handed investigation.

182. Why were they not? Again, Mr Egan's evidence provided the answer: he had a settled view that the claimant was acting maliciously, and this view was predicated in large part on the fact of the claimant's whistleblowing. He was angry and frustrated with the claimant, in large part because of his view the claimant was acting maliciously, and he wanted to shut down the arguments raised by the claimant as a consequence.

183. What of the fact that the claimant failed to provide his answers to Mr Egan on who the files belonged to? I accepted that this was a failure on the part of the claimant, who had around 5 days from the date of access to the system, to 4 November when his access was cut off. But, I concluded that this failure did not impact on the issue, that Mr Egan had already decided that even if the claimant had created these files elsewhere, they belonged to the respondent and that the claimant had deliberately taken the files without permission.

184. The failure to conduct an even handed investigation and the finding that the claimant's actions amounted to gross misconduct was significantly because of Mr Egan's negative view of the claimant, which was significantly based on his whistleblowing.

185. The 2nd allegation was that the claimant had failed to obey an instruction to attend the office for a disciplinary investigation meeting. At this stage the claimant was on garden leave, and was required to attend the office when required to do so.

186. Mr Egan's evidence was that he did not always handle the meetings well – his view was that he was being bullied by the claimant, not vice versa. But, it was Mr Egan who mimicked the claimant's voice and speech in the previous call, and this was a reason the claimant gave for not wanting to attend the office.

187. In a disciplinary hearing, the reason the claimant gave for not attending should have been considered. They were ignored, not being included as a factor in the 15 November letter. I concluded that Mr Egan's summary of the claimant's

refusal to attend set out in the letter, that it was "a complete waste of time and you were not going to waste your time coming into work.." was inaccurate. It does not address at all the claimant's statement that he felt bullied. Mr Egan's view was that the claimant was being obstructive, and the reason why he considered this was because from the outset he believed the claimant was acting maliciously, and the reason why he believed this was because the claimant had whistleblown. By dismissing the claimant's explanation, and instead concluding the claimant had committed an act of misconduct, Mr Egan subjected the respondent to a whistleblowing detriment.

188. The third misconduct ground is that the claimant breached a line management requirement not to inform outside parties. The 17 September 2019 letter does not include an instruction not to contact outside parties, it does say that during the consultation period the external message will be that he is on leave. The message was made clearer in meetings, that the claimant was not to tell anyone outside the business he was potentially being made redundant. But, critically, the instruction was not to make contact during the consultation period. This ended on 4 November, when the claimant's dismissal was confirmed. There was no express instruction not to contact outside parties after this confirmation.

189. Again, this is an issue which an even handed investigation would have considered. The fact that it was not an even-handed investigation was, I concluded, on grounds of the claimant's whistleblowing, in particular Mr Egan's view that the claimant was acting with malice.

190. It follows that the claimant has succeeded in his claim that he was subject to whistleblowing detriments during the investigation process by his explanations to the disciplinary allegations being disregarded, and by the finding at the end of the process that he had committed acts of misconduct.

Detriments 23 & 24 – on 20 December 2019 R's COO Mr Egan and CEO Richard Abrahams notified the Financial Conduct Authority of the misconduct findings made against C

191. As set out above I reached the conclusion that Mr Egan's decision to discipline the claimant was motivated by his whistleblowing allegations, that the claimant as acting maliciously in making them, and that this was the principal reason why the claimant was found guilty of gross misconduct.

192. The respondent' s case is that it had a genuine belief in the claimant's misconduct. I accept that Mr Egan's view was that the claimant had committed misconduct; but this view was only held because he was of the settled opinion that the claimant had been acting with malice throughout. This reason – the claimant's malice – was the reason why Mr Egan considered the claimant had deliberately deleted files, had obstructed the process by not attending meetings, and had deliberately contacted outside parties.

193. I also noted that the respondent told the FCA that a ground of gross misconduct had been the claimant's *"subsequent attempted cover-up"* that he had deleted the files. This appears to have been a conclusion reached by Mr Egan following

his conversation with X. But this was not an allegation that was put as a disciplinary issue to the claimant. I concluded that this was an example of Mr Egan 'over-egging' the pudding, they were above and beyond the actual disciplinary allegations.

194. I concluded that Mr Egan's view that the claimant was acting with malice from the outset of the process in making the whistleblowing allegations caused him to view the claimant as having deliberately sought to cover his own acts of misconduct, which was then communicated to the FCA. I concluded that Mr Egan's belief in the claimant's misconduct was because the claimant had made whistleblowing disclosures.

195. It follows that a material factor in the decision to refer the misconduct findings to the FCA was the fact that the claimant had whistleblown.

196. I heard no evidence on the thought processes behind Mr Abrahams decision to disclose the same information to the FCA. But, I concluded that there was no independent review of the evidence by Mr Abrahams, that this was done on the say-so of Mr Egan, who no doubt convinced Mr Abrahams the claimant had committed these acts. Noting this, and considering *Jhuti,* I concluded that Mr Abrahams would not have made the disclosure without Mr Egan's influence, based on Mr Egan's view that the claimant was acting with malice which was based on his view of the claimant's disclosures

197. Accordingly allegation 23 & 24, that the referral of the claimant to the FCA was a whistleblowing detriment, succeed

Other detriments

Detriment 4 – R did not follow its own policy in respect of the Claimant's 20 September 2019 disclosures, and generally failed to keep him informed or to progress the investigation expediently, as set out in the R's Compliance Manual, or respond to his 13 November 2019 requests

198. I noted the reasons why Mr Egan did not keep the claimant informed of the progress. It was apparent during the hearing that Mr Egan had only a hazy idea of the policies of the respondent. I concluded that he was not considering the compliance manual, he was not aware what the policy was, he did not consider that he needed to keep the claimant informed. Also, the claimant did not chase this issue up.

199. I accepted that the reason why the investigation was not progressed quickly was because the 3rd party who was advising was himself slow, Mr Egan did not chase, it drifted a little.

200. The decision not to keep the claimant informed, or progress the investigation, was not in any way linked to the fact the claimant had made a whistleblowing disclosure.

201. This allegation fails and is dismissed.

Detriment 17 – R chose to base the outcome of the disciplinary process on a company disciplinary policy that had been created by R's lawyer one day before R issued a letter alleging gross misconduct

202. As with detriment 4, the respondent's policies were not always up to date, and Mr Egan was not on top of them. The fact that the respondent had to seek an up to date disciplinary policy was not connected to the claimant's whistleblowing allegations.

203. This allegation therefore fails and is dismissed.

Detriment 18 – on 22 November 2019 C was told that the full grounds of his appeal against a finding of gross misconduct might not be considered as he had not filed them within five working days.

204. There was a 5 working day deadline set out in the policy Mr Egan reminded him of this fact in the 22 November email and I accepted that it was implicit in this answer that if outside the deadline the appeal may not be considered.

205. However I did not accept that the reason why Mr Egan implied this was because of the claimant's whistleblowing; he would have said it to any employee he had disciplined, because this is what the policy says.

206. This allegation therefore fails.

Detriment 20 – R significantly delayed addressing C's 29 October 2019 grievance until 19 December 2019

207. The main reason for the delay was Mr Benton suggesting the appeal should be dealt with by someone other than him, and this was undertaken after Mr Benton had completed the redundancy appeal process. I accepted that Mr Yeung was diligent in his approach and did not delay matters when he took over.

208. Any delay was therefore not because the claimant had made public interest disclosures, and the allegation therefore fails.

Detriment 21 - on 19 December 2019 R's Chairman, Mr William Yeung, rejected C's grievance, and upheld a finding of gross misconduct

209. I accepted Mr Yeung's evidence that he approached this task diligently and that he did not have in mind the claimant's whistleblowing activities when he reached his decision.

210. However, I also considered that this case was analogous to the *Jhuti* situation. Mr Egan convinced himself that the claimant was guilty of serious misconduct, because of what he considered to be the claimant's malice. This fed directly into Mr Yeung's decision making. While he did listen to all transcripts, and spent a long time considering the issues, I also found that he accepted without critical examination Mr Egan's conclusions.

211. Accordingly, I concluded that Mr Yeung adopted Mr Egan's point of view, the view which was predicated on the claimant's malice. Considering *Jhuti* I concluded that Mr Yeung unknowingly committed an act of detriment based on the claimant's whistleblowing activities.

212. This allegation therefore succeeds.

Detriment 22 - R continued to deny C sight of X's statement.

213. I did not accept that this amounted to a whistleblowing detriment. Again Mr Yeung adopted Mr Egan's position, and Mr Egan was not subjecting the claimant to a whistleblowing detriment by denying him sight of the written evidence of X.

214. This allegation therefore fails.

Time

215. The dates of the detriments are – 20 September 2019 (detriment 2); 20-29 October. 14 November, 19 December. The ET notification by the claimant to ACAS was on 10 December 2019 and the EX Certificate was issued on 24 January 2020. The claim was issues on 2 February 2020.

216. It was apparent that the first act of unlawful detriment was within 3 months of the date of EC notification, and the claim was issued within a month of the EC certificate. All claims are therefore issued in time.

Summary

217. The following allegations of detriment on the ground of making public interest disclosures therefore succeed:

    a. Detriment 2
    b. Detriments 12 – 15 (in part)
    c. Detriment 16
    d. Detriment 21
    e. Detriments 23 & 24

218. A listing will shortly be sent out for a short PH Case Management hearing to consider the issues to be determined at remedy and to set a timetable for a remedy hearing.

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EMPLOYMENT JUDGE EMERY

Case number: 2200392/2020V

Dated: 20 June 2022

Judgment sent to the parties
On: 21/06/2022

For the staff of the Tribunal office